Haron bin Mukri v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–292 OF 2009
ZALEHA ZAHARI, SULONG MATJERAIE AND AZHAR MA'AHJJCA
20 JULY 2011

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Criminal Law — Dangerous Drugs Act 1952 — ss 12(2), 39A(1) — Possession of dangerous drugs — 5.43g of methamphetamine — Appeal against conviction and sentence — Appellant found in close proximity to drugs recovered — Whether appellant had custody, care and control of drugs — Appellant in state of shock when confronted by police — Whether element of knowledge proved — Defence of bare denial

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Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in 45.08g of monoacetylmorphines — Appeal against conviction and sentence — Appellant found in close proximity to drugs recovered — Whether appellant had custody, care and control of drugs — Whether appellant dealing with paraphanelia connected with drug trafficking activities — Appellant in state of shock when confronted by police — Whether element of knowledge proved — Defence of bare denial

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Acting on information received, PW6 and his team of officers raided a house in Batu Pahat. They had stopped their vehicle about 20–25 meters away from the said house and went on foot through an oil palm plantation area and reached the rear portion of the said house. Thereat, PW6 saw the appellant sitting on an overturned bucket/pail in front of a table facing the rear wall of the said house. PW6 and his team next approached the appellant from the rear. PW6 grasped the appellant's left arm and identified himself. The appellant appeared shocked and stunned. From the table, PW6 seized several transparent plastic packets containing the dangerous drugs. The appellant was charged with three charges as follows: (i) trafficiking in 45.08g of monoacetylmorphines, an offence under s 39B(1)(a)of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA; (ii) having possession of 83.79g of cannabis, an offence under s 6 of the DDA and punishable under s 39A(2) of the DDA; and (iii) having possession of 5.43g of methamphetamine, an offence under s 12(2) of the DDA and punishable under s 39A(1) of the DDA. In his defence, the appellant denied having any knowledge or anything to do with the items found and recovered. According to him, that morning, after completing his work at his oil palm plantation, he had sat on the overturned bucket in front of the table to smoke. The sealer, scissors and empty plastic packets were already there on the table. About five minutes later two men came from behind and handcuffed

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him. The appellant contended that at the time of his arrest there was also another person by the name of Wak Pandi, present about 80 feet away from the scene. The said Wak Pandi was not arrested. The prosecution adduced evidence predominantly through the testimony of PW6 of actual possession of the drugs by the appellant without resorting to the presumption under s 37(d)of the DDA. Thereafter, the presumption of the trafficking under s 37(da) of the DDA was invoked in respect of the first charge since the morphine found exceeded 15g. The High Court judge found the appellant guilty on the first and third charges and imposed the mandatory sentence of death. Hence, this appeal.

Held, dismissing the appeal:

(1) By reason of the fact the appellant was in close proximity to the drugs recovered, the appellant had custody, care and control of the said drugs. The appellant was dealing with the paraphernalia of exhibits connected with drug trafficking activities then lying on the table. The fact of the appellant being in a state of shock when confronted with PW6 was also taken into consideration. By reason of these factors the element 'knowledge' had been proved (see para 8).

(2) The appellant's defence was essentially one of bare denial which was not sufficient to dislodge the prosecution's case. The version of the appellant's defence was an afterthought. The appellant's story about Wak Pandi's presence at the scene was successfully rebutted by the prosecution's witness (ie PW6). The judge was right in finding as a fact that at all material time the appellant was the only person sitting at the table where the drugs, where the subject matter of the first and third charge were found (see para 14).

(3) The learned trial judge was right in his analysis of the evidence adduced and the application of the relevant principles of law thereto (see para 15).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, PW6 dan sepasukan pegawainya menyerbu rumah di Batu Pahat. Mereka memberhentikan kenderaan mereka lebih kurang 20–25 meter daripada rumah tersebut dan masuk dengan berjalan kaki melalui kawasan kebun kelapa sawit dan sampai ke bahagian belakang rumah tersebut. Di situ, PW6 nampak perayu duduk di atas baldi/timba yang terbalik di hadapan meja yang berhadapan dinding belakang rumah tersebut. Kemudian PW6 dan pasukannya mendekati perayu dari belakang. PW6 menggenggam tangan kiri perayu dan memperkenalkan dirinya. Perayu nampak terkejut dan terkedu. Dari meja, PW6 merampas beberapa paket plastik lut sinar mengandungi dadah berbahaya. Perayu dituduh dengan tiga tuduhan seperti berikut: (i) mengedar dadah *monoacetylmorphines* sejumlah 45.08g, kesalahan di bawah s 39B(1)(a) Akta

Dadah Berbahaya 1952 ('ADB') dan boleh dihukum di bawah s 39B(2) ADB; (ii) memiliki kanabis sejumlah 83.79g, kesalahan di bawah s 6 ADB dan boleh dihukum di bawah s 39A(2) ADB; dan (iii) memiliki methamphetamine sejumlah 5.43g, kesalahan di bawah s 12(2) ADB dan boleh dihukum di bawah s 39A(1) ADB. Dalam pembelaannya, perayu menafikan mempunyai apa-apa pengetahuan atau bersangkut paut dengan barang-barang yang dijumpai dan diperolehi. Mengikut perayu, pagi hari itu, selepas menyiapkan kerjanya di ladang kelapa sawit, dia duduk atas baldi yang terbalik tersebut di hadapan meja untuk hisap rokok. Bahan tampal, gunting dan paket plastik kosong sudah terletak di atas meja. Kira-kira lima minit kemudian dua orang lelaki datang dari belakang dan menggarinya. Perayu berhujah bahawa pada masa penangkapannya terdapat juga seorang lagi yang bernama Wak Pandi, berada lebih kurang 80 kaki jauh daripada tempat kejadian. Wak Pandi tidak ditangkap. Pendakwaan mengemukakan keterangan lebih banyak melalui keterangan PW6 mengenai milikan sebenar dadah tersebut oleh perayu tanpa merujuk kepada anggapan di bawah s 37(d) ADB. Kemudiannya, anggapan pengedaran di bawah s 37(da) ADB dibangkitkan berkaitan tuduhan pertama memandangkan morfin yang diperolehi melebihi 15g. Hakim Mahkamah Tinggi mendapati perayu bersalah atas tuduhan-tuduhan kedua dan ketiga dan mengenakan hukuman mati mandatori. Maka, rayuan ini.

Diputuskan, menolak rayuan:

(1) Atas fakta bahawa perayu berada dekat dengan dadah yang diperolehi, perayu mempunyai jagaan dan kawalan dadah tersebut. Perayu berurusan dengan barang–barang ekshibit berhubung dengan aktiviti-aktiviti pengedaran dadah yang berada di atas meja. Fakta perayu berada dalam keadaan terkejut apabila berdepan dengan PW6 juga diambil kira. Atas alasan ini unsur pengetahuan telah dibuktikan (lihat perenggan 8).

(2) Pembelaan perayu pada dasarnya penafian kosong yang tidak mencukupi untuk menolak kes pendakwaan. Versi pembelaan perayu adalah yang difikirkan kemudiannya. Cerita mengenai kehadiran Wak Pandi di tempat kejadian berjaya dipatahkan oleh saksi pendakwaan ('PW6'). Hakim adalah betul dalam dapatannya sebagai fakta bahawa pada kesemua masa material perayu seorang saja yang duduk dekat meja di mana dadah, di mana perkara subjek tuduhan pertama dan kedua diperolehi (lihat perenggan 14).

(3) Hakim perbicaraan yang bijaksana betul dalam analisanya mengenai keterangan yang dikemukakan dan pemakaian prinsip undang-undang yang relevan tersebut (lihat perenggan 15).]

Notes

For cases on s 39B(1) of the Dangerous Drugs Act 1952, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 445–592.

A For cases on s 12(2) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 678–679.

Cases referred to

Abdul Manaf bin Mohamad Hassan v PP [2003] 4 MLJ 374; [2003] 3 CLJ 641, B CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 12(2), 37(d), 37(da), 39A(1), 39A(2), 39B(1)(a), 39B(2) First Schedule

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K Viknesvaran (Viknes Ratna & Co) for the appellant.
Murtazadi Amran (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

D **Azhar Ma'ah JCA (delivering judgment of the court):**

[1] In the High Court Muar the appellant was prosecuted on three charges. They read as follows:

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1st Charge

Bahawa kamu pada 24.07.2005 jam lebih kurang 11.30 pagi di rumah No. 33, Kampung Parit Tegak, Parit Sulong, dalam daerah Batu Pahat, di daiam Negeri Johor Darul Takzim telah didapati mengedar dadah berbahaya iaitu 45.08 gram F Monoacetylmorphines, dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

2nd Charge

G Bahawa kamu pada 24.07.2005 jam lebih kurang 11.30 pagi di rumah No. 33, Kampung Parit Tegak, Parit Sulong, dalam daerah Batu Pahat, di dalam Negeri Johor Darul Takzim bukan sebagai seorang yang diberi kuasa atau disifatkan sebagai seorang yang diberi kuasa di bawah Akta Dadah Berbahaya 1952, telah didapati memiliki dadah berbahaya iaitu 83.79 gram cannabis, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 6 Akta Dadah Berbahaya 1952 H dan boleh dihukum di bawah seksyen 39A(2) Akta yang sama.

3rd Charge

Bahawa kamu pada 24.07.2005 jam lebih kurang 11.30 pagi di rumah No. 33, Kampung Parit Tegak, Parit Sulong, dalam daerah Batu Pahat, di dalam Negeri I Johor Darul Takzim bukan sebagai seorang yang diberi kuasa atau disifatkan sebagai seorang yang diberi kuasa di bawah Akta Dadah Berbahaya 1952, telah didapati memiliki dadah berbahaya iaitu 5.43 gram Methamphetamine, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihuklum di bawah seksyen 39A(1) Akta yang sama.

[2] The High Court judge at the close of the prosecution's case found that the prosecution has made out prima facie case against the appellant in respect of the first and third charge and ordered the appellant to enter his defence, whilst in respect of the second charge the appellant was acquitted and discharged without calling for his defence.

[3] In respect of the first and third charge at the close of the defence case, the learned High Court judge found the appellant guilty on these two charges. Upon conviction in respect of the first charge he imposed the mandatory sentence of death. In respect of the third charge he imposed a sentence of imprisonment of three years and three strokes. Hence, this appeal.

[4] Briefly the facts of this case as found by the High Court are as follows:

> Acting on information received on 24 July 2005 at about 10.30 am, PW6 (DSP Teng Chan Chew) together with his team of officers raided house No 33, Kampung Parit Tegak, Parit Sulong, Batu Pahat. They went in a police van. They stopped their vehicle about 20 to 25 meters away from the said house. They went on foot through kawasan kebun kelapa sawit and reached the rear portion of the said house.
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> Thereat, PW6 saw a man sitting on an overturned bucket/pail in front of a table. The table was facing the rear wall of the said house. … Positional wise, PW6 said that the man was seated on the overturned bucket in front of the table facing the rear wall of the house. In turn he was facing the man's back.
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> PW6 and his team next approached the man from the rear. He grasped the man's left arm and identified himself. The man appeared shocked and stunned. The man is the accused. On the table were several items. He found and seized the following items on the table:
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> (1) One red plastic bag (Exhibit P-6A) containing:-
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> 1.1 One large transparent plastic packet containing yellowish substances suspected to be heroin (Exhibit P-6B).
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> 1.2 One small transparent plastic packet containing yellowish substances suspected to be heroin (Exhibit P-6C).
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> …
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> (2) One sling bag carrying the 'Levis' brand name (Exhibit P-7A) containing:-
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> 2.1 10 transparent plastic packets and inside the plastic packets were 10 white plastic 'ubat' containing yellowish substances suspected to be heroin (Exhibits P-7B(1 to 10)).
>
> 2.2 9 transparent plastic packets containing yellowish substances suspected to be heroin (Exhibits P-7D (1 to 9)).
>
> Items 1.2, 1.2, 2.1 and 2.2 enumerated above formed the basis of the first charge levelled against the accused.

A One white plastic packet 'ubat' (Exhibit P-7F(1)). Inside this packet were 5 transparent plastic packets containing substances suspected to be syabu (Exhibits P-7F(2 to 6)).

These items formed the basis of the third charge levelled against the accused.

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The Nature of the Drugs

The chemist, PW5 examined these exhibits submitted to him by the I.O. of the case. At the end of his examination he concluded that the exhibits consisted of 45.08 grammes of monoacetylmorphines, 5.45 grammes of methamphetamines … He also testified that monoacetylmorphines and methamphetamine are both listed in the First Schedule of the DDA, 1952 …

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[5] During the trial at the High Court, the prosecution adduced evidence predominantly through the testimony of PW6 of actual possession of the offending drugs by the appellant without resorting to the presumption under s 37(d) of the Act. Thereafter, the presumption of the trafficking under s 37(da) of the Act was invoked in respect of the first charge since the morphine found exceeded 15g.

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E CUSTODY AND CONTROL

[6] The starting point in the consideration of the issue of custody and control of the offending drugs by the appellant is to be found in the learned trial judge's analysis of facts and evidence before him which reads as follows:

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Upon the facts and evidence adduced, I find as a fact that in so far as the first and second charge is concerned the incriminating exhibits found on the table were wholly under the custody and control of the accused.

The accused was found seated in front of the incriminating exhibits and was directly facing the exhibits. He was seated there alone. The other occupants of the house ie his late mother was inside the house. His two brothers were also inside the house and both were arrested inside the house for investigation in connection with other offences. The accused was at the scene of the seizure of the drugs with no one else. It was suggested by learned counsel that a villager, one Wak Pandi, was also there. Thus, however, was dismissed by PW6. According to PW6 if Wak Pandi was there he would also have arrested Wak Pandi. I accepted the denial by PW6 of the presence of Wak Pandi at the scene of the arrest of the accused and seizure of the said exhibits.

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PW6 added that he saw the accused meddling (PW6 used the word 'menguruskan') with the exhibits on the table just before he grasped the accused's arm. PW6 also said that the accused appeared shocked and stunned after he identified himself to him.

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… Based on the evidence of PW6, it is abundantly clear that the accused was the only person in proximity to the incriminating drugs. There were also hundreds of pieces of new, unused, small plastic packets right next to the drugs together with a sealer machine generally used to pack items and seal them in the plastic packets ….

[7] The above passage, to our mind has cogently answered the salient issues raised and canvassed before us by learned counsel for the appellant, ie:

(a) that the trial judge had failed to evaluate the evidence of SP6; and

(b) that the trial judge had failed to consider the existence of other persons in the house.

[8] As regards 'knowledge' vis-a-vis actual possession we agree with the views expressed by the learned trial judge. The judge's finding was that by reason of the fact the appellant was in close proximity to the drugs recovered, the appallent had custody, care and control of the said drugs. The judge also accepted PW6's evidence that the appellant was dealing ('menguruskan') with the paraphernalia of exhibits connected with drug trafficking activities then lying on the table. The fact of the appellant being in a state of shock when confronted with PW6 was also taken into consideration. We are in agreement with the learned judge that by reason of these factors the element 'knowledge' had been proved.

[9] In *Abdul Manap bin Mohamad Hassan v Public Prosecutor* [2003] 4 MLJ 374; [2003] 3 CLJ 641, the Court of Appeal came out with this statement:

> Our observation of the above judgment makes it clear that when there was evidence of actual possession the trial judge should make positive finding that there was actual possession of the drug by the accused person and he should not invoke the presumption under s 37(d) of the Act. If the trial judge invoke s 37(d) to establish possession even though there was evidence of actual possession and then went on to invoke s 37(da) to establish trafficking, it would be a serious misdirection.

[10] Reverting to the present case, we observe that the learned trial judge had on the factual matrix of the evidence before him, deemed it sufficient to make an affirmative/positive finding of actual possession of the drugs in question by the appellant without having to resort to statutory presumption under s 37(d) of the Act. He then went on to invoke statutory presumption of trafficking under s 37(da) of the Act and consequently ordered the appellant to enter upon his defence.

THE DEFENCE OF THE APPELLANT

[11] Basically, the defence raised by the appellant at the trial was a denial of him having any knowledge or anything to do with the items found and recovered. According to him, on this fateful morning after completing his work at his oil palm plantation at about 11am, after taking a drink he went out of the house and sat on an overturned bucket in front of the table to smoke. The sealer, scissors and empty plastic packets were already there on the table. He sat facing the rear wall of the house. About five minutes later two men came from

behind and handcuffed him. Soon after, five or six more men came into the vicinity and conducted a search at the rear portion of the house. According to the appellant, they recovered a red plastic bag on the ground beside the table he was seated ('exh P6A'). They also recovered a red plastic bag ('exh P8A') found amongst the pile of firewood underneath the kitchen of the house. The appellant testified that he had no knowledge of the contents of exhs P6A and P8A.

[12] It was also the appellant's contention that at the time of his arrest there was also another person by the name of Wak Pandi, who was an employee of the appellant's late mother, present about 80ft away from the scene. The said Wak Pandi was not arrested. Apart from that nothing more was said about this so-called Wak Pandi.

THE COURT'S DECISION

[13] Our perusal of the appeal records, in particular the learned trial judge's grounds of judgment, clearly shows that the learned judge did not believe the appellant's version and made a finding that the appellant's defence is essentially one of bare denial which is not sufficient to dislodge the prosecution's case. At the close of the defence, the court has to decide whether the defence had succeeded in raising a reasonable doubt on the prosecution's case. Clearly, the learned trial judge had answered the question in the negative.

[14] On our part we cannot agree more. And we would further add that the version of the appellant's defence was an afterthought. We find that the appellant's story about Wak Pandi's presence at the scene has been successfully rebutted by the prosecution's witness (ie PW6). We are of the view that the judge was right in finding as a fact that at all material time the appellant was the only person sitting at the table where the drugs, where the subject matter of the first and third charge were found.

[15] In the circumstances, we are of the view that the learned trial judge was right in his analysis of the evidence adduced and the application of the relevant principles of law thereto. We, therefore, dismissed the appellant's appeal and affirmed the conviction and sentence meted out.

Appeal dismissed.

Reported by Kanesh Sundrum